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APPLICATION NO.

FILING DATE

FIRST NAMED INVENTOR

ATTORNEY DOCKET NO.

CONFIRMATION NO.

10/782,794

02/23/2004

Mark Roland Boeder

CHRE:178

6789

7590

01/26/2006

PARKHURST & WENDEL
SUITE 210
1421 PRINCE STREET
ALEXANDRIA, VA 22314

EXAMINER

HWU, JUNE

ART UNIT

PAPER NUMBER

1661

DATE MAILED: 01/26/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary	Application No. 10/782,794	Applicant(s) BOEDER, MARK ROLAND	
	Examiner June Hwu	Art Unit 1661	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 11/5/05
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

The amendment filed October 5, 2005 has been acknowledged.

The text of those sections of Title 35, U.S. Code not included in this action can be found in the prior Office action.

Claim Rejections - 35 USC § 102

Claim 1 remains rejected under 35 U.S.C. 102(b) as being anticipated by the European Plant Breeder's Right application number 011850 published on February 15, 2002, more than one year prior to the filing date of the instant application in view of Applicant's admission that the instant cultivar was first sold in August 2002 at a flower auction in the Netherlands (reply dated January 24, 2005, page 3 and reply dated October 5, 2005, page 1) and the Royal Horticultural Society Dictionary Gardening 1992, vol. 1 describing how to asexually propagate a chrysanthemum.

Response to Arguments

Applicant's arguments filed October 5, 2005 have been fully considered but they are not persuasive.

Applicant argues that the instant assignee never disclose information regarding varieties prior to registration to third parties regardless of the denomination of the instant cultivar and the assignee as the breeder did not provide any information to the third parties as to where to purchase the plant.

This argument has not been found persuasive because the plant was placed in the public domain more than one year prior to the U.S. filing date of this application (see *LeGrice*). The flowering stems of the instant plant were sold at flower auction more than one year prior to the filing date of the instant application. This foreign sale must not be an obscure, solitary

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occurrence that would go unnoticed by those skilled in the art. Since as described in the Office Action dated August 25, 2005 on page 2, almost $\frac{3}{4}$ of the total export market of The Netherlands in 2002 consisted of flowers and plants sold at Dutch auctions. Whether or not the assignee divulged any information regarding where to purchase the instant cultivar, the fact remains that the foreign sale occurred at the flower auction and it was not an obscure, solitary occurrence that would go unnoticed by a skilled artisan. As stated in the previous Action dated August 25, 2005 on pages 2-3, The Netherlands regard cut flowers and plants as a major export business. It is noted in the PBR application (received on January 24, 2005) that a photograph of the instant cultivar was attached with the document showing the uniqueness of the ray florets having a red-purple coloration with a white margin. Regardless of how the name of instant cultivar was denominated in the published PBR application, a person skilled in the art could have recognized the instant cultivar in the flower auction because of the unique coloration of the flower and could have purchased the cut flowers and asexually propagated. The reproducibility of the chrysanthemum is commonly known to one of ordinary skill in the art as detailed in The New Royal Horticultural Society Dictionary of Gardening 1992, vol. 1, pages 614-617.

Applicant argues that the PBR Application containing only a breeder's reference cannot be linked to the public sale of the plant when sold under a different variety name.

This argument has not been found persuasive because as stated above the PBR application contained a photograph of the instant cultivar a person of ordinary skill would have recognized the instant cultivar in the auction because of its two-tone flower coloration, regardless of the name. Even if the photograph had not been available, the publication of the PBR served to put the public on notice that the instant plant was available.

Applicant also argues that the breeder would not have sold the plant or released information about the plant when referred to by its breeder's reference number.

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This argument has not been found persuasive because regardless of whether this may or may not have occurred, the plant was in the public's possession more than one year prior to the U.S. filing date (see *LeGrice*). The foreign sale was not an obscure, solitary occurrence that would go unnoticed by those skilled in the art. Therefore, the plant was in the public domain and one of ordinary skill in the art could have obtained the plant after the plant was ready for sale and more than a year prior to the filing date of this instant application. The publication served as notice to the public that the plant existed. Sale of the plant, served to enable the publication. Additionally, as mentioned previously asexual reproduction of chrysanthemum is well known in the art.

In conclusion, the instant cultivar was accessible to the public in the flower auction more than one year prior to the filing date of the instant application and the published PBR was available to the public and a skilled artisan would have been able to asexually reproduce the plant. Therefore, the PBR publication was enabled and serves as a bar under 35 U.S.C. 102(b).

For the reasons outlined above and in the previous Office action, the rejection is deemed proper and is maintained.

THIS ACTION IS MADE FINAL. Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event,

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however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Conclusion

No claim is allowed.

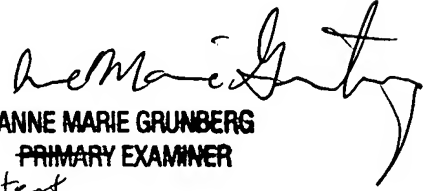
Future Correspondence

Any inquiry concerning this communication or earlier communications from the examiner should be directed to June Hwu whose telephone number is (571) 272-0977. The Examiner can normally be reached Monday through Thursday from 6:30 a.m. to 5:00 p.m.

If attempts to reach the Examiner by telephone are unsuccessful, the Examiner's supervisor, Anne Marie Grunberg, can be reached on (571) 272-0975. The fax number for the organization where this application or proceeding is assigned is (571) 273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

JH


ANNE MARIE GRUNBERG
PRIMARY EXAMINER
Supervisory Patent